LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 13 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 1389

ADOLPH WEINBERG and ETTA WEINBERG,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' REPLY BRIEF.

ERNEST GEORGE WILLIAMS,
DEMETRIOU & DEL GUERCIO,
RICHARD A. DEL GUERCIO,
RONALD J. DEL GUERCIO,
[illegible] South Flower Street,
Los Angeles, Calif. 90017,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

IN THE

Supreme Court of the United States

October Term, 1967
No. 1389

ADOLPH WEINBERG and ETTA WEINBERG,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' REPLY BRIEF.

Pursuant to the provisions of Rule 24 of Revised Rules of the Supreme Court of the United States, 28 U.S.C.A., this reply brief is filed and is addressed to the arguments first raised in Point 2 (pages 3, 4 and 5) of Respondent's Memorandum in Opposition.

The Tax Court, notwithstanding the assertions by the Commissioner in the notice of deficiency and a written stipulation that petitioners transferred matured farm crops to various corporations, considered, for the first time after trial, the issue of whether farm crops were transferred, imposed the burden of proof upon petitioners to establish that farm crops were transferred and determined that petitioners failed to establish the transfer of farm crops.

Respondent seeks to excuse the Tax Court's disregard of the notice of deficiency and written stipulation and consideration of the issue for the first time after trial, on the grounds: first, that the Commissioner is permitted, for the first time after trial, to abandon his assertions that farm crops were transferred and substitute an assertion that cash was transferred; and, second, that in any event petitioners' remedy for this sudden change was a request for continuance of the trial.

To characterize the Commissioner's abandonment of the assertions of transfer of farm crops in the notice of deficiency and stipulation as a permissible change in the theory whereby the deficiency is assessed is to ignore the difference between permissible changes in legal theories based upon a constant assertion of ultimate fact and this situation where petitioners' proof, at the trial, was addressed to the ultimate facts placed in issue by the notice of deficiency and written stipulation and thereafter the Commissioner urged the Tax Court to disregard the notice of deficiency and stipulation and consider as an issue whether cash as distinguished from farm crops was transferred.

The cases and text cited by respondent in footnote 2 on page 4 of the Memorandum for the Respondent in Opposition do not stand for the proposition that the Commissioner may, after trial, abandon the assertions of ultimate fact contained in the notice of deficiency and stipulation. Where the Commissioner asserts a transfer of matured farm crops in his notice of deficiency and stipulates that farm crops were transferred and for the first time, after trial, requests the Tax Court to disregard the stipulation and find that

cash, not farm crops, was transferred, he seeks to accomplish a result by a method condemned by this court in *Helvering v. Tex-Penn Co.*, 300 U.S. 481 at 498, 81 L. Ed. 755.

> "The taxpayers were entitled to know the basis of law and fact on which the Commissioner sought to sustain the deficiencies."

The petitioners should be under no obligation to support by evidence an ultimate fact of transfer of farm crops when the Commissioner in his notice of deficiency and written stipulation so asserts. *Security First National Bank of Los Angeles*, 28 B.T.A. 289. And in *Harbor Plywood Corp. v. Comm'r* (C.A. 9th 1944), 143 F. 2d 780:

> "This court will not consider in support of a deficiency assessment, reasons not advanced by the Commissioner in his deficiency notice or before the Board of Tax Appeals especially when the taxpayer has been deprived thereby of the opportunity to present evidence material thereto."

Respondent's argument that petitioner's remedy was to request a continuance of the trial is not only inadequate in attempting to reach a fair result but is misleading in its factual assertions of the sequence of events.

Contrary to respondent's assertion in its Memorandum in Opposition, the Commissioner, after trial, for the first time argued that cash proceeds from the sale of farm crops were transferred to the corporations and that the stipulation to the contrary should be disregarded.

The Tax Court clearly so states in its opinion:

> ". . . we have determined, that the proceeds from the sale of the crops, rather than growing or matured crops themselves, were transferred to the corporations by petitioners in exchange for their stock. *Respondent makes this argument, for the first time, in his final brief and further argues that the stipulation to the contrary should be disregarded.*" (Emphasis added).

At the commencement of the trial petitioners' counsel stated to the court:

> "We feel that in our stipulation of facts that we have a stipulation that the petitioners Adolph and Etta Weinberg did transfer property in the form of farm crops to a number of these corporations . . ."

At no time during the course of trial did respondent dispute the statement, refer at all to the stipulation, indicate to the trial court that the stipulation provided otherwise, or request the stipulation be disregarded.

Commissioner Davis, who tried the case, set forth in his "Report of Commissioner" (see Appendix C to Petition for a Writ of Certiorari), "It is stipulated that the stock of all the corporations except ET and Girard was issued 'in exchange for said $1000 and farm crops.'"

Respondent's first attempt to avoid the plain language of the stipulation occurred in final brief (Respondent's Exceptions to the Commissioner's Findings of Fact and Reply Brief) where respondent states (p. 9):

> "Respondent submits that the portion of the stipulation of facts involved here is both incorrect and a conclusion of law which is not binding upon the Court."

Petitioners, therefore, had no occasion to request relief from this action until after the receipt of the decision of the Tax Court. Thereupon petitioners filed a timely Motion to Reopen the Proceedings to Receive Additional Evidence, the grounds for which were "In that the Tax Court considered as an issue of fact, whether proceeds from the sale of farm crops rather than farm crops as such were transferred, by the individual petitioners to the several petitioner corporations notwithstanding an express written stipulation of fact that farm crops had been so transferred and notwithstanding an affirmation of fact that farm crops had been transferred in the notice of deficiency . . ." This motion is proper where the issue determined by the Tax Court was not one to which the parties, in light of the notice of deficiency and stipulation, addressed their proofs at trial. *Helvering v. Edison Securities Corp.*, 78 F. 2d 85 (4th Cir. 1939), 35-2 U.S.T.C. Para. 9425.

The Tax Court denied the motion.

Respondent did not file any objection to petitioners' motion to reopen the proceedings.

Thus, this is not a case, as respondent argues, where petitioners' remedy was a motion for continuation at the beginning of the trial.

In addition to the significance of the sequence of events which is set forth above, the respondent's assertion in his brief to the Tax Court that the stipulation of transfer of farm crops is a conclusion of law, is significant.

Respondent, in arguing to the Tax Court for relief from the stipulation, asserts the stipulation of transfer

of crops is one of law, and thus beyond the power of the parties. But respondent, having once persuaded the Tax Court to disregard the stipulation, then argues to the Court of Appeals and to this Court that the issue of whether farm crops were transferred is really one of fact as distinguished from law. Having spun a tangled web of inconsistent positions, respondent must now admit that if the issue of transfer of farm crops is one of fact then the notice of deficiency and stipulation unequivocally establish the fact and eliminate the issue from consideration by the Tax Court and that petitioners reasonably and justifiably conducted the trial of the case on that assumption and that the subsequent disregard by the Tax Court has deprived petitioners of a fair trial. If, on the other hand, respondent would again argue that the issue is one of law, then it follows that the issue was not before the Tax Court by reason of the notice of deficiency and stipulation and the petitioners were deprived of a fair trial when the Tax Court first considered the issue after trial and, further, that the appellate court erred in failing to extend its review to questions of law.

Respectfully submitted,

ERNEST GEORGE WILLIAMS,
DEMETRIOU & DEL GUERCIO,
RICHARD A. DEL GUERCIO,
RONALD J. DEL GUERCIO,
Attorneys for Petitioners.